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ARIZONA ATTORNEY GENERAL

September 5, 1961

Mr. Gene McClellan
State Representative
8307 N. 29th Drive
Phoenix 2, Arizona

Dear Mr. McClellan:

I have rephrased your letter of August 22nd relative to the following question, to divide it into two questions as follows:

Assuming that a taxpayer filed a State Income Tax Return after the return date, on which the total tax amounts to \$50. Assume further that \$40 of the \$50 tax has been withheld and paid to the State.

1. Does the late filing penalty provision of A.R.S. §43-180 apply to the total tax due, i.e. \$50., or does it merely apply to the balance due, i.e., \$10.?
2. Assuming the same state of facts, does the interest provision of §43-181 apply to the total tax due, i.e., \$50., or to the balance due, i.e., \$10.?

ANSWER:

1. The penalty is assessed on the total tax, i.e., \$50.
2. Interest is assessed on the balance due, i.e., \$10.

The penalty provision under our income tax statutes are set forth in part, as follows:

"A.R.S. §43-180. Payments and Assessments-penalties

(a) Failure to file return, penalty. If any taxpayer fails to make and file a return required by this title on or before the due date of the return or the due date as extended by the tax commission, then, unless it is shown that the failure is due to reasonable cause and not due to willful neglect, five per cent of the tax shall be added to the tax for each thirty days or fraction thereof elapsing between the due date of

Originator

PHILIP HAGGERTY

I Concur

ANDY BAUMERT

I Concur

MORRIS ROZAR

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Mr. Gene McClellan
State Representative

61-122-L
September 5, 1961
Page Two

the return and the date on which filed, but the total penalty shall not exceed twenty-five per cent of the tax. The penalty so added to the tax shall be due and payable upon notice and demand from the tax commission." (Emphasis added).

It will be noted that the section noted above refers only to the "tax" and not to the "tax due" or to the "unpaid balance." This in itself would give rise to a presumption that the penalty is to be assessed on the whole amount. It would also appear from a practical viewpoint that the legislature felt that the penalty, in order to have any real effectiveness at all, must apply to the total amount, rather than to the deficiency. A large number of persons pay their state income tax entirely by means of withholding provisions, and the amount owing over and above the amount withheld is usually quite small and a penalty of 5% on that amount would be almost negligible and ineffective as a penalty.

This legislative interpretation is reinforced by the language used regarding the interest due on late payments. That statute is as follows:

"A.R.S. §43-181. Interest and penalty for failure to remit

(a) Failure to remit

(1) If the tax imposed by this title, whether determined by the tax commission or the taxpayer, or any installment or portion of the tax is not paid on or before the date prescribed in its payment, there shall be collected, as a part of the tax, interest upon the unpaid amount at the rate of six per cent per year from the date prescribed for its payment until it is paid."
(Emphasis added)

The above clearly shows that the interest is only charged on the balance due, in our example, on the \$10. This difference in language to describe the amount of tax affected appearing in consecutive sections of the law clearly shows that a difference in the effect was intended.

Our income tax law was adopted in the Internal Revenue Code of 1954. A.R.S. §43-180(a) is a duplicate (with minor technical variances) of 28 U.S.C. §66-51(a). The Federal Government, however, has an additional §28 U.S.C., §66-51(b) which specifically

Mr. Gene McClellan
State Representative

61-122-L
September 5, 1961
Page Three

states that the penalty shall only be on that part of the tax which has not been paid on or before the due date. However, under the prior internal revenue codes the present subsection (b) of 26-6651 was not in effect. During that time two federal decisions held that the penalty provision apply to the total tax. They are: Plunkett v. Commissioner of Internal Revenue, 113 Fed.2d, 655 (1941) and Amer. Milk Products Corporation v. the United States, 41 Fed. 2d 956, 70 Ct. Cl 169 (1930). Thus the Federal interpretation of the federal law, at a time as it read exactly as our law reads, was in accord with this opinion. It is a general rule of statutory construction that the decisions of other courts upon similar statutes from which the statute in issue is derived are presumed to have been considered by the legislature, and their interpretations followed. Sutherland, Statutory Construction 5201-5211. The tax commission has uniformly, since the enactment of our income tax statutes, treated A.R.S. §43-180 as imposing a penalty upon the entire tax. This long-standing administrative interpretation is also authority for the proposition that the penalty is assessed on the entire amount of the tax. See Long v. Dick, 87 Ariz. 25, 347 P.2d. 581 (1959).

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